ORA

Office of Ratepayer Advocates
California Public Utilities Commission

JOSEPH P. COMO
Acting Director

505 Van Ness Avenue
San Francisco, California 94102
Tel: 415-703-2381
Fax: 415-703-2057
http://ora.ca.gov

August 26, 2014

President Michael R. Peevey
Commissioner Michel Peter Florio
Commissioner Catherine J.K. Sandoval
Commissioner Carla J. Peterman
Commissioner Michael Picker

Subject: **Agenda Item No. 41 - August 28, 2014 Commission Meeting, Comments Before the FCC NPRM GN 14-28, In The Matter of Protecting and Promoting the Open Internet**

Dear Commissioners,

The Office of Ratepayer Advocates (ORA) encourages the Commission to file comments advocating for a strong pro-ratepayer position in the current Federal Communications Commission's (FCC's) *Notice of Proposed Rulemaking for Protecting and Promoting the Open Internet* (*Open Internet NPRM or NPRM*), issued on May 15, 2014.[1] The goal of the *NPRM* is "to find the best approach to protecting and promoting Internet openness."[2] The most effective way to achieve this goal is to adopt common carrier rules that prohibit blocking, discrimination, and paid prioritization of Internet traffic, and firmly ground them in the legal provisions of Title II.[3] All consumers will benefit from rules that ensure nondiscriminatory access to an Open Internet, encourage competition and universal access, and protect privacy and public safety.

The FCC issued this *NPRM* in the wake of *Verizon v. FCC*,[4] in which the United States Court of Appeals for the District of Columbia struck down the FCC's Open Internet rules adopted in 2010.[5] The Open Internet rules (which many refer to as "Net Neutrality" rules) consist of three basic principles:

[1] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (2014) (*NPRM*). Reply Comments are due September 15, 2014.

[2] *Id*., at ¶ 4.

[3] Title II of the Communications Act of 1934, *see* 47 U.S.C. §§ 201 et seq.

[4] *Verizon v. FCC*, 740 F.3d 623 (2014).

[5] *In re: Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010).

1. **Transparency.** Internet Service Providers (ISPs) must provide accurate, publicly available information about their network management practices.
2. **No Blocking.** ISPs shall not block lawful content, applications, or services. Includes mobile service.
3. **No Discrimination.** ISPs shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Allows for reasonable network management, and bans paid prioritization.[6]

In January 2014, the D.C. Circuit Court vacated the no-blocking and no-discrimination rules, but upheld the transparency rule. The D.C. Circuit said that the problem lies with the FCC's designation of broadband in 2002 as an "information service."[7] The Telecommunications Act of 1996 subjects telecommunications carriers, but not "information service providers," to common carrier regulation under Title II of the Communications Act.[8] The Court carefully examined the no-blocking and no-discrimination rules and concluded that they are common carrier rules only applicable to telecommunications carriers, and could not be imposed on "information service" providers.

In light of this decision, ISPs are now free to block and discriminate against Internet traffic. The D.C. Circuit found that ISPs have the financial incentive and the technological means to do so.[9] The Court noted that ISPs like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own video subscription services,[10] and they "represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[11] The Court also found that ISPs have powerful incentives to accept fees (or "tolls") from edge providers[12] for excluding their competitors or for granting the edge providers prioritized access to end users.[13] Moreover, ISPs have the technological ability to distinguish between (and therefore discriminate against) certain types of Internet traffic.[14] Because ISPs have the means and the incentive to block and/or impose unfair "tolls" on edge providers, in the absence of Open Internet rules these practices

[6] *In re: Preserving the Open Internet (Open Internet Order)*, 25 F.C.C.R. 17905 (2010), at 17906, 18066.

[7] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002).

[8] *Verizon v. FCC* at 630; see 47 U.S.C. § 153(53).

[9] *Verizon v. FCC* at 645, citing to *Open Internet Order*, 25 F.C.C.R. at 18066.

[10] *Ibid*.

[11] *Verizon v. FCC* at 646.

[12] Edge providers are those, like Amazon or Google, who provide content, services, and applications over the Internet, while end users are those who consume edge providers' content, services, and applications. See *Open Internet Order*, 25 F.C.C.R. at 17910.

[13] *Verizon v. FCC* at 646.

[14] *Ibid*. One technology is referred to as "deep packet inspection."

could result in blocked/slowed Internet traffic and increased prices. Consumers who pay for Internet access may not get what they pay for, and their access may vary depending on content or source.

If the FCC reclassifies broadband as a "telecommunications service" under 47 U.S.C. § 153, it may then apply the provisions of Title II of the Telecommunications Act of 1996 that authorize the FCC to regulate "common carriers." For example, provisions of Title II ban "unreasonable preference or advantage to any particular person."[15] Title II would provide a firm legal foundation for the FCC's Open Internet rules.

Instead of relying on Title II, the FCC proposes to adopt a rule that would permit companies to make whatever financial arrangements they wish, provided they are "commercially reasonable."[16] However, it is not clear what "commercially reasonable" means and it is unlikely that this rule would prevent blocking, discrimination, or paid prioritization. If it did so, it would amount to common carrier regulation, which the D.C. Circuit held is permissible only if the FCC classifies ISPs as common carriers. It appears that the FCC is proposing a weak substitute for its Open Internet rules rather than face the politically difficult re-designation of broadband as a telecommunications service.[17] The "commercially reasonable" rule would not protect Internet openness as it may allow ISPs to block competitors or to extract substantial "tolls" from edge providers by threatening to limit or block their access to end users.

In light of the legal and practical issues discussed here, ORA recommends that the Commission submit comments in the FCC's *NPRM* that call on the FCC to reclassify broadband Internet access service to Title II accompanied by restrained regulation. The FCC should apply only those sections of Title II necessary to implement and enforce the no-blocking and no-discrimination rules; prioritize real-time Internet traffic related to public health and safety functions; advance universal access of broadband service goals;[18] protect customer privacy; and promote competition.

---

[15] "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202.

[16] *Cellco v. FCC*, 700 F.3d 534 (2012). In *Cellco*, the D.C. Circuit ruled that Section 706 provided authority for the "commercially reasonable" rule.

[17] As a practical matter, reclassification is not difficult. The D.C. Circuit Court indicated it would give deference to the FCC's reclassification of broadband, as it initially did when in 2002 the FCC reclassified broadband from a telecommunications service to an information service. *Verizon v. FCC* at 630, 650. If the FCC reclassifies broadband as a telecommunications service, it is actually a "re-reclassification" back to "telecommunications service."

[18] The National Broadband Plan (NBP) sets forth goals to improve broadband deployment and adoption, implement a public safety broadband wireless network for first responders and other public safety personnel, expand rural coverage and strengthen existing infrastructure. The NBP is available at http://www.fcc.gov/national-broadband-plan.

The attached memorandum provides ORA's detailed analysis and recommendation.

Sincerely,

/s/ Chris Ungson

Program Manager
Office of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
(415) 703-2574
Chris.Ungson@cpuc.ca.gov

cc: Carol Brown
Lester Wong
Sepideh Khosrowjah
Marcelo Poirier
Jessica Hecht
Ditas Katague
Bill Johnston
Allison Brown
Julie Fitch
Niki Bawa
Ken Koss
Christine Hammond
Liz Podolinsky

State of California **Public Utilities Commission**
San Francisco

M E M O R A N D U M

Date : August 26, 2014

To : President Michael R. Peevey
Commissioner Michel Peter Florio
Commissioner Catherine J.K. Sandoval
Commissioner Carla J. Peterman
Commissioner Michael Picker

From : Chris Ungson, Program Manager
Ana-Maria Johnson, Program and Project Supervisor
Travis T. Foss, Staff Counsel
Office of Ratepayer Advocates

Subject: Federal Communications Commission's Notice of Proposed Rulemaking in the Matter of Protecting and Promoting the Open Internet

This memo provides legal and policy analysis in support of the Office of Ratepayer Advocates' (ORA's) August 26 Letter to CPUC Commissioners regarding Net Neutrality currently before the Federal Communications Commission (FCC). On May 15, 2014 the FCC issued a Notice of Proposed Rulemaking for Protecting and Promoting the Open Internet (NPRM) seeking comments on this question: What is the right public policy to ensure that the Internet remains open?[1]

A. ORA's Recommendations

Given the current state of the law, the "right public policy" requires that the FCC classify broadband as a common carrier service. Reclassification of broadband as a common carrier would give the FCC the necessary legal authority to adopt rules to keep the Internet open and to prevent Internet Service Providers (ISPs) from engaging in preferential treatment (discrimination) and blocking of Internet communication.[2] ORA urges the Commission to submit reply comments in the *NPRM* that call on the FCC to reclassify broadband Internet access service as a common carrier service under Title II of

[1] *NPRM* at ¶ 2.

[2] In this memorandum, the terms Internet Service Provider (ISP), broadband Internet access provider, and broadband provider are used interchangeably. These fixed and mobile providers include, for example, Comcast, Time Warner, AT&T and AT&T Wireless, and Verizon and Verizon Wireless, who sell broadband connectivity to the Internet to end user customers.

the Telecommunications Act of 1996[3] and adopt limited, carefully targeted regulations. The FCC should apply only those provisions of Title II necessary to implement and enforce no-blocking and no-discrimination rules; prioritize real time Internet traffic related to public health and safety functions; advance the goal of universal access to broadband service; protect customer privacy; and promote competition.

1. The FCC Should Reclassify Broadband As A Telecommunications Service

The FCC issued this *NPRM* in the wake of the D.C. Circuit Court's decision in *Verizon v. FCC*, 740 F.2d 623 (2014), which vacated the FCC's Open Internet rules.[4] These rules prohibit blocking and discrimination by ISPs, and require transparency of ISP practices.[5]

These rules, which the FCC adopted in its 2010 *Open Internet Order* pursuant to 47 U.S.C. § 1302 (Section 706 of the 1996 Telecommunications Act), were intended to "compel broadband providers to treat all Internet traffic the same regardless of source – or to require, as it is popularly known, 'net neutrality.'"[6] Section 706 directs the FCC and each state commission to encourage the deployment of broadband telecommunications capability by utilizing price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[7]

The D.C. Circuit found the FCC's justification for the rules to be reasonable and supported by substantial evidence;[8] however, it also determined that the anti-blocking and anti-discrimination rules imposed common carrier obligations. The Court held that the FCC may not impose common carrier obligations on ISPs because the FCC has

---

[3] 47 U.S.C. §§ 201 et seq.

[4] 740 F.3d 623 (2014).

[5] The D.C. Circuit Court did not vacate the transparency rule, which is now in effect and therefore not pertinent to the *NPRM*.

[6] *Verizon v. FCC,* 740 F.3d at 628. Section 706 of the Telecommunications Act is codified at 47 U.S.C. § 1302, but throughout the *Verizon* decision, the D.C. Circuit refers to it as "§ 706" and the FCC does so as well throughout the *NPRM*.

[7] Section 706(a) provides: "The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a).

[8] *Verizon v. FCC* at 644.

classified broadband service as an "information service."[9] The 1934 Communications Act, as modified by the Telecommunications Act of 1996, applies to telecommunications carriers but not to "information service" providers.[10] Thus, the *Verizon* court concluded, but for the designation of broadband as an "information service," the FCC could have legally imposed the anti-blocking and anti-discrimination rules on ISPs. Consequently, the FCC will have authority to adopt Open Internet rules (pursuant to section 706) if it classifies broadband service as a "telecommunications service" rather than an "information service."

As legal matter, reclassification is not difficult. Title II permits the FCC to forbear if determines that it is necessary and in the public interest.[11] The FCC could make such a determination regarding the classification of broadband, and courts must defer to an agency's interpretation if they determine that the agency's interpretation represents a reasonable resolution of a statutory ambiguity.[12] For example, the D.C. Circuit deferred to the FCC's reclassification of broadband initially in 2002 when the FCC reclassified cable modem service from a telecommunications service to an information service, and that deference was upheld in the Supreme Court's *Brand X* decision.[13] Although there will inevitably be a legal challenge, if the FCC reclassifies broadband it is on sound legal footing.

The D.C. Circuit Court specifically stated that reclassification would allow the FCC to lawfully adopt the anti-blocking and anti-discrimination rules. Designation of ISPs as common carriers would also enable the FCC to utilize other provisions of Title II such as 47 U.S.C. § 202, which bans "unreasonable preference or advantage to any particular person," or 47 U.S.C. § 222, which protects consumer privacy.

2. The FCC Should Adopt The Open Internet Rules Prohibiting Blocking And Discrimination

If the FCC reclassifies broadband as a "telecommunications service," it may legally impose the Open Internet rules it adopted in its 2010 Open Internet Order, including the anti-blocking and anti-discrimination rules described above, as well as the transparency rule that the D.C. Circuit has upheld.

---

[9] *Verizon v. FCC* at 650.

[10] *Verizon v. FCC* at 630; see 47 U.S.C. § 153(53).

[11] 47 U.S.C. § 160(a).

[12] See *Verizon v. FCC* at 635, citing to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[13] *Verizon v. FCC* at 630, 650. In 2005, the U.S. Supreme Court upheld the FCC's reclassification of Internet traffic as an "information service" citing Chevron deference. *National Cable & Telecommunications Ass'n v. Brand X Internet Services* (Brand X), 545 U.S. 967 (2005).

It is important to take note of the public discussion regarding "paid prioritization" and Internet "fast lanes."[14] "Paid prioritization" is a form of discrimination that is illegal under the now-vacated anti-discrimination rule.[15] There are two forms of "paid prioritization"; first, payment for a special "fast lane," and second, payment to avoid blocking or throttling.[16] ORA recommends that "paid prioritization" be carefully defined and monitored (consistent with the transparency rule) to ensure that it does not occur.

A legal form of reasonable discrimination that ORA does not oppose is "reasonable network management," which does not prioritize Internet traffic as to content or source. For example, "reasonable network management" is necessary to address legitimate network congestion problems.

3. The FCC Should Employ Restrained Regulation – No Need For Every Provision Of Title II

If the FCC reclassifies broadband as a "telecommunications service," ISPs would be subject to common carrier regulation under Title II. However, ORA recommends restrained regulation that imposes only those provisions of Title II that are necessary to prevent blocking and discrimination; advance the goals of broadband access deployment; maintain and enhance public safety; protect customer privacy; and promote competition.

The FCC should forbear from Title II regulations that do not further its Open Internet policies.[17] For example, rate regulation of ISPs under Title II need not be applied. Some commenters have noted that forbearance is a complicated and lengthy legal process.

---

[14] *Verizon v. FCC*, Dissenting Opinion, at 668.

[15] Although the FCC never expressly said that the rule forbids broadband providers from granting preferred status or services to edge providers who pay for such benefits, it warned that "as a general matter, it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard." *Verizon v. FCC* at 633. The FCC defined such arrangements as charge to deliver data to and from end user customers on a more favorable basis than other traffic. In the Open Internet Order, the FCC indicated the practical effect of such an arrangement would be to force a content, application, or service provider to pay access fees to the broadband provider in order to avoid being blocked (the FCC viewed the distinction between blocking and degrading traffic as merely "semantic"). The FCC concluded that "charging such fees would not be permissible under these rules." *Open Internet Order*, FCC 10-201, GN Docket No. 09-191, WC Docket No. 07-52, December 23, 2010, ¶ ¶ 66-67.

[16] For example, Netflix has publicly described how its traffic was throttled (intentionally slowed) by Comcast. Netflix made a presentation to the CPUC regarding its views on Net Neutrality, and presented a slide regarding the throttling episode. Netflix's presentation is publicly available on the CPUC website. http://www.Commission.ca.gov/NR/rdonlyres/59AC4906-9F2F-46C7-AF28-23713425B57F/0/NetNeutralityatCommission.pdf

[17] For example, Section 706 specifically authorizes "regulatory forbearance" to further the goals of "deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."

However, it is not a difficult process when the FCC decides to do so on its own, and may only be true when a company disagrees with the FCC's decision not to forbear under certain circumstances (such as where competition has been proven to exist).[18]

Moreover, there is no technical or engineering reason why the FCC cannot classify broadband as a telecommunications service. Some ISPs have argued that certain Internet functions such as web browsing, email, and Domain Name System (DNS) are "information services" that are technically inseparable from broadband service. They argue that if there is an information service component to any aspect of broadband service, then it must be entirely classified as an information service.[19] This "inseparability" appears to be more a function of marketing than technical limitations. As Justice Scalia argued in his dissent in the *Brand X* decision:[20]

> The merger of the physical connection and Internet functions in cable's offerings has nothing to do with the "inextricably intertwined" … nature of the two …, but is an artificial product of the cable company's marketing decision not to offer the two separately, so that the Commission could … exempt it from common-carrier status.

4. The FCC's Open Internet Rules Should Prioritize Real Time Internet Traffic As Necessary For Public Health and Safety Functions

There are important public health and safety functions of broadband that can and should be prioritized, using common carrier rules. For example, end users and government personnel should not encounter congestion when attempting to reach 911 or other public emergency services. At a minimum, public health and safety functions should never be subject to IP interconnection disputes. It is important to give these services priority to ensure the Internet can continue to be used for health and safety infrastructure.

---

[18] 47 U.S.C. § 160 permits the FCC to forbear applying the provisions of Title II if necessary to protect consumers and in the public interest.

[19] See *NPRM* Comments by: Comcast at pp. 57-59; AT&T at pp. 41-49; and Verizon at pp. 61-63. A broadband subscriber can use the broadband provider's email or other email services such as Yahoo Mail and Google Mail. Similarly the broadband subscriber can use the broadband provider's default web browser or instead change the default to her web browser of choice such as Firefox and Google Chrome. DNS is comparable to Local Number Portability and the 800 Service Database used in traditional telephone services.

[20] 545 U.S. at 989.

a) Title II Provides The FCC And States Additional Tools To Achieve Universal Service Goals Under the National Broadband Plan

Reclassification would provide the FCC and states with additional tools to achieve the goals set forth in the National Broadband Plan. In early 2009, Congress directed the FCC to develop a National Broadband Plan (NBP) to ensure every American has "access to broadband capability."[21] The NBP also encourages competition, noting that 78 percent of residential customers can choose from only two wireline broadband providers and another 13 percent have only one option.[22] The NBP includes a detailed strategy to increase broadband service to more Americans and maximize broadband use for health, safety, and education purposes. Common carrier rules should be implemented to ensure that broadband users share in the financial burdens of these goals, and not just voice customers who pay for it today.

5. Protect Consumer Privacy

Consumer privacy needs to be protected. The FCC's *NPRM* does not explicitly propose a privacy policy, but 47 U.S.C. § 222 requires telecommunications carriers to protect the confidentiality of proprietary information of telecommunications carriers, equipment manufacturers, and customers. If the FCC reclassifies broadband as a "telecommunications service," it can adopt Title II privacy rules for ISPs similar to those already in place for telecommunications carriers.

B. Net Neutrality Will Not Discourage Investment In Broadband Facilities

Claims that reclassification, when accompanied with forbearance of many sections of Title II, would negatively impact investment in broadband Internet access networks should be viewed with skepticism. Many ISPs have made the claim that the level of investment made by ISPs is a direct result of the FCC's light regulatory approach, and

[21] "Connecting America: The National Broadband Plan" (2010) http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf. It should be noted that the FCC itself cautions against using the national broadband map database as a definitive measure to determine the level of customer choice in broadband providers. This is because of limitations in the census block data itself. For example, if a provider can serve only one household in a census block, the entire census block is assumed to be served by that provider. Additionally, customer choice is partly driven by the broadband speeds available. If a customer who is currently receiving 10 Mbps download service is dissatisfied with her current provider, an alternative provider that can provide only 4 Mbps download service is not a realistic alternative. This is becoming more and more the case because DSL service is technologically not capable of providing the higher broadband speeds of cable networks.

[22] NBP at 37.

that the level of future investment in broadband internet access networks will depend on a continued light regulatory approach.

These claims, however, are not supported by convincing evidence and ignore studies that reach opposite conclusions. For example, Comcast, Verizon, and AT&T's Comments in the *NPRM* cite a quantitative (econometric) study by an attorney named Christopher Yoo (Yoo Study)[23] that finds that the level of investment and deployment in broadband internet access networks is greater in the United States than in Europe.[24] It attributes this difference to the lighter regulatory approach employed in the United States. An econometric approach toward establishing such a cause and effect relationship between countries (in this case a continent and the U.S.) is faced with the significant methodological challenge of controlling for multiple complex variables. This challenge is thoroughly described by the FCC-commissioned Berkman Report (discussed below), which includes a literature review of broadband investment and performance studies. A major flaw in the Yoo Study is that it does not disaggregate investment data between fixed and mobile broadband.

A more thorough and peer-reviewed study is the Berkman Center for Internet and Society at Harvard University (Berkman Report), which the FCC requested to undertake a review of global broadband internet and policy.[25] The Berkman Report reached a different conclusion than the Yoo Study and concluded that U.S. broadband performance in the past decade has declined relative to other countries and is "no better than middling."[26] The Berkman Report found that countries with more engaged regulatory policies that more actively promoted competition performed better across a range of metrics.[27]

---

[23] Yoo, Christopher, "U.S. Versus European Broadband Deployment: What Do the Data Say?," Center for Technology, Innovation and Competition, University of Pennsylvania Law School, June 2014. http://www.ora.ca.gov/USvsEurope/ This study was funded by Broadband for America. Because this study is relatively new, ORA has not identified peer review articles that provide an analysis, for example, of its panel model specifications, its use of a total of only fifty-five observations over two consecutive years, its use of "percentage of DSL for new entrants" and "standard Cable coverage" as policy variables, and its standard for concluding statistical significance.

[24] See *NPRM* Comments; Verizon at 14, Comcast at 47, and AT&T at 9.

[25] "Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World," Berkman Center for Internet and Society at Harvard University (2010). This report was funded by the Ford Foundation and John D. and Catherine T. MacArthur Foundation. http://www.ora.ca.gov/BerkmanCenter/

[26] Berkman Report at 8.

[27] Berkman Report at 15.

The Berkman Report findings comport with the results contained in Akamai's Q1 2014 State of the Internet Report (Akamai Q1 2014 SOTI Report) which ranked the U.S. 12th globally in average connection speed (10.5 Mbps), 17th in average peak connection speed (40.6 Mbps), 27th in percent of broadband connectivity greater than 4 Mbps (73%), 7th in percent of connectivity greater than 10 Mbps (36%), and 13th in percent of connectivity greater than 15 Mbps (17%).[28] This highlights the importance of achieving the universal service goals of the National Broadband Plan.

An initial draft of the Berkman Report was posted by the FCC on its webpage in 2009 and the FCC received comments that were considered before the issuance of the final report. The Berkman Report includes a literature review (57 studies) encompassing quantitative and qualitative studies of broadband internet access investment and penetration.[29] It chose to employ a qualitative approach, noting systematic limitations in cross-country econometric models that entail significant challenges:

> The challenge of quantitative broadband policy analysis is to estimate the impact of policy choices on outcomes, most commonly Internet penetration or investment levels. In order to do so, the analysis must control for a large number of variables that are correlated with policy choices and have an influence on penetration or investment rates. This requires a solid theoretical basis for specifying a model and sufficient data to estimate the model. In most cases, neither of these requirements is met.

Lee Selwyn *et al* (Economics and Technology, Inc.) took a more targeted approach to the question of fixed broadband internet access investment as it relates to regulatory policy (Selwyn Paper).[30] His methodological approach entailed comparing U.S. incumbent local exchange carriers' (ILECs - AT&T, Verizon, and Qwest) capital investment in two time periods; from 1996 to 2001 when the FCC regulatory approach was to actively promote and catalyze competition under Title II, and from 2001 to 2007 when the FCC changed the classification of broadband to an "information service" and employed light regulation. As an indicator of capital investment, the Selwyn Paper used annual changes

---

[28] Akamai Q1 2014 SOTI Report, pp. 14, 15, 16, 17, 21, 23. http://www.ora.ca.gov/AkamaiSoti/ In comparison, South Korea ranked 1st across all these performance attributes with an average connection speed of 23.6 Mbps, average peak connection speed of 68.5 Mbps, percentage of connectivity greater than 4 Mbps of 94%, percentage of connectivity greater than 10 Mbps of 77%, and percentage connectivity greater than 15 Mbps of 60%. In a comparison of U.S. states, California was not in the top 10 (see pp. 18, 19, 20).

[29] Berkman Report at 90-136.

[30] Selwyn, Lee, *et al*, "Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs," Economics and Technology, Inc., (2010). http://www.ora.ca.gov/ETIRegulation/ The Selwyn Paper was funded by a group of telecommunications carriers that included Time Warner Telecom, Inc., Covad Communications, Integra Telecom, Inc., and PAETECH Holding Corp.

in the ILECs' gross Total Plant In Service. It concluded that increased investment took place during the period when the FCC actively promoted competition. The numbers are striking:

> From 1996 to 2001 Verizon's gross Total Plant In Service increased by $56.5 billion. From 2001 to 2007 it increased by $39.8 billion.[31]
>
> From 1996 to 2001 AT&T's (SBC, SNET, Ameritech, Pacific Bell, and Bell South) gross Total Plant In Service increased by $73.7 billion. From 2001 to 2007 it increased by $49.4 billion.[32]
>
> From 1996 to 2001 Qwest's gross Total Plan In Service increased by $20 billion. From 2001 to 2007 it increased by $7 billion.[33]

The Selwyn Paper demonstrates that pro-competitive regulation can be effective, and fears that Title II regulation will chill investment are unfounded.

The Yoo Study, the Berkman Report, and the Selwyn Paper do agree on at least one important point: ILEC investment in broadband networks was to a certain extent spurred by rivalry with the cable companies (Comcast and Time Warner, for example) which were in a unique position to utilize last mile plant originally deployed for video transmission. A more recent example of how rivalry drives investment is AT&T's deployment of fiber-based broadband Internet access service in Austin, Texas in response to Google Fiber's entry into that market.

Based on these three studies it is reasonable to conclude that caution should be exercised in establishing a direct cause and effect relationship between investment outcomes under different regulatory frameworks. The calculus of investment decisions is far more complicated and one that includes many variables.

C. The Need For Open Internet Rules Is Well Documented

It is abundantly clear that ISPs have both the means and the motive to engage in blocking, discrimination, and paid prioritization. In 2009, the FCC noted that "conduct is occurring in the marketplace that warrants closer attention and could call for additional action by the Commission, including instances in which some Internet access service

[31] Selwyn Paper at 9.

[32] Selwyn Paper at 10.

[33] Selwyn Paper at 10.

providers have been blocking or degrading Internet traffic, and doing so without disclosing those practices to users."[34]

The current *NPRM* identifies instances of blocking or discrimination. For example, Madison River Communications, a telephone company and provider of DSL service, was the subject of complaints by Vonage that Madison River was blocking ports that were typically used by Vonage customers to make Voice over Internet Protocol (VoIP) telephone calls.[35]

In 2008 the FCC ordered Comcast to end its discriminatory network practices, which stemmed from a complaint by Free Press and Public Knowledge.[36] The FCC found that Comcast had unduly interfered with Internet users' right to access the lawful Internet content and to use the applications of their choice. Specifically, the FCC found that Comcast had deployed equipment throughout its network to monitor the content of its customers' Internet connections and selectively block specific types of connections known as peer-to-peer connections.

The D.C. Circuit Court noted that broadband providers may offer content, applications, and services that compete with those furnished by edge providers.[37] For example, "a broadband provider like Comcast might limit its end-user subscribers' ability to access the New York Times website if it wanted to spike traffic to its own news website, or it might degrade the quality of the connection to a search website like Bing if a competitor like Google paid for prioritized access."[38]

The D.C. Circuit Court noted that AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own "core video subscription service."[39] Netflix has publicly described how it was throttled by Comcast. Netflix made a presentation to the CPUC regarding its views on Net Neutrality,

---

[34] *In the Matter of Preserving the Open Internet Broadband Industry Practices* FCC WC Docket No. 07-52 (2009).

[35] *NPRM* at ¶ 17.

[36] "Commission Orders Comcast To End Discriminatory Network Management Practices" FCC Press Release (2008) https://apps.fcc.gov/edocs_public/attachmatch/DOC-284286A1.pdf .

[37] Edge providers are those, like Amazon or Google, who provide content, services, and applications over the Internet, while end users are those who consume edge providers' content, services, and applications. See *Open Internet Order*, 25 F.C.C.R. at 17910.

[38] *Verizon v. FCC* at 630.

[39] *Id.* at 645.

and presented a graph illustrating the Netflix's speeds during the throttling episode. Netflix's presentation is available on the CPUC's website.[40]

The D.C. Circuit found "nothing in the record gives us any reason to doubt the Commission's determination that broadband providers may be motivated to discriminate against and among edge providers."[41]

Although some ISPs have disavowed any intent to block or discriminate against edge providers, ISPs have powerful incentives to accept fees (or "tolls") from edge providers, in return for excluding their competitors or for granting them prioritized access to end users.[42] The D.C. Circuit Court found that ISPs have the technological ability to distinguish between and discriminate against certain types of Internet traffic,[43] and they "represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[44]

D. Historical Context For This NPRM

In 2005, the FCC attempted to prevent discrimination and unfair practices by adopting an *Internet Policy Statement* setting forth general Internet policy principles intended "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet."[45] The FCC subsequently adopted these policies in a series of merger cases.[46]

The *Internet Policy Statement* was necessary because, in 2002, the FCC had determined that broadband Internet access service (offered over cable modem, Digital Subscriber

---

[40] http://www.Commission.ca.gov/NR/rdonlyres/59AC4906-9F2F-46C7-AF28-23713425B57F/0/NetNeutralityatCommission.pdf

[41] Verizon v. FCC at 645.

[42] *Verizon v. FCC*, at 646.

[43] *Ibid.* One technology is referred to as "deep packet inspection."

[44] *Verizon v. FCC*, at 646.

[45] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 9810, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14987-88, para. 4 (2005) (*Internet Policy Statement*).

[46] *NPRM*, ¶ 14.

Line (DSL), wireline and wireless facilities) is not subject to Title II and could not be regulated as common carrier service.[47] This was a departure from prior FCC rulings because in 1998 the FCC classified DSL services—broadband Internet service furnished over telephone lines—as "telecommunications services." DSL services, the Commission had previously held, involved pure transmission technologies, and thus had been subject to Title II regulation.[48]

The FCC also applied open Internet principles in the context of an enforcement proceeding. In 2005, the FCC's Enforcement Bureau entered into a consent decree with Madison River Communications,[49] which required Madison River to stop blocking VoIP ports and refrain from otherwise inhibiting customers from using the VoIP applications of their choice.[50]

In 2007, it came to the FCC's attention that several subscribers to Comcast's cable broadband service complained that the company had interfered with their use of certain peer-to-peer networking applications.[51] The FCC ordered the company to adhere to a new approach for managing bandwidth demand and to disclose the details of that approach.[52] The FCC justified this order citing to its general authority to issue whatever orders as necessary to execute functions within its jurisdiction.[53] However, this ancillary authority must be grounded in specific grants of delegated authority, and the D.C. Circuit pointed out that the FCC failed to identify the provisions of actual authority specifically delegated by Congress.[54] Thus, the FCC had failed to adequately justify the authority upon which it grounded the Comcast order.

---

[47] *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4824, para. 41 (2002) (*Cable Modem Declaratory Ruling*), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[48] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24012, 24014, 24029–30 ¶¶ 3, 35–36 (1998) (*Advanced Services Order*).

[49] *Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enforcement Bur. 2005) (*Madison River Order*).

[50] *NPRM*, ¶ 17.

[51] *Verizon v. FCC*, p. 11.

[52] *Ibid*. See also *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008).

[53] 47 U.S.C. § 154(i).

[54] *Verizon v. FCC*, p. 12.

While the *Comcast* matter was pending, the FCC sought comment on a set of proposed rules that, with some modifications, eventually became the open Internet rules at issue in *Verizon v. FCC*.[55] In 2010, the FCC issued the *Open Internet Order*, which created the three basic rules for an open Internet listed above.[56] The *Order* imposed a transparency rule, requiring both fixed and mobile providers to "publically disclose accurate information regarding the network management practices, performance, and commercial terms" of their broadband Internet access service.[57] The *Order* adopted anti-blocking requirements, barring fixed providers from blocking "lawful content, applications, services, or non-harmful devices subject to reasonable network management."[58] And the *Order* also adopted an anti-discrimination rule for fixed providers, barring them from "unreasonably discriminat[ing] in transmitting lawful network traffic," subject to "reasonable network management."[59]

In *Verizon v. FCC*, the D.C. Circuit Court approved the use of Sections 706(a) and 706(b) by the FCC to promulgate rules governing broadband providers, specifically prohibiting discrimination against edge providers by the broadband providers. The legitimate purpose, the D.C. Circuit held, is to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,"[60] and to prevent broadband providers' potential disruption of edge-provider traffic which could be the sort of "barrier" that has "the potential to stifle overall investment in Internet infrastructure," and could "limit competition in telecommunications markets."[61] In other words, the D.C. Circuit Court approved without reservation the approach taken by the FCC, with one exception.

That exception, however, proved to be an obstacle that the FCC, with its current designation of broadband as an information service, could not overcome.[62] The D.C. Circuit Court pointed out that "A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services."[63] The Court found (after a lengthy examination), that an

---

[55] *In re Preserving the Open Internet*, 24 F.C.C.R. 13064 (2009).

[56] *Open Internet Order*, 25 FCC Rcd 17905, ¶ 1.

[57] 47 C.F.R. § 8.3.

[58] 47 C.F.R. § 8.5.

[59] 47 C.F.R. § 8.7.

[60] *Verizon v. FCC,* p. 31.

[61] *Ibid.,* citing to the *Open Internet Order*, 25 F.C.C.R. at 17970 ¶ 120.

[62] *Ibid*.

[63] *Id*., p. 45. See 47 U.S.C. § 153(51).

edge provider's request to the broadband provider to provide reasonable service free of discrimination is a hallmark of common carriage status.[64] The Court went on to conclude that the anti-blocking and anti-discrimination rules were, therefore, common carrier rules. Thus, given the FCC's decision to classify broadband providers not as providers of "telecommunications services" but instead as providers of "information services," the FCC may not impose common carrier rules such as anti-blocking and anti-discrimination on broadband providers.[65]

a) CPUC History

ORA's position is firmly consistent with past CPUC filings and briefings relating the Open Internet rules and net neutrality. On several prior occasions, the CPUC has strongly supported an Open Internet, free from discriminatory practices.

In 2004, in the FCC proceeding "In The Matter of IP-Enabled Services Proceeding" (WC Docket No. 04-36), with regards to voice telephony over IP, the CPUC advocated that the FCC should assert Title II authority "to ensure the fundamental policy objectives of the Act are realized." In the days before net neutrality or Open Internet were common phrases, the CPUC recommended that Title II authority should be asserted to ensure that "functionally equivalent service should be treated similarly when provided by those similarly situated regardless of the technology deployed or the facilities used, in order to prevent undue discrimination and regulatory arbitrage." (Emphasis added.) Thus as early as 2004 the CPUC was advocating, at least with regards to voice over the internet (VoIP), assertion of Title II regulation to prevent undue discrimination.

In 2010, in the FCC proceeding "In the Matter of: Preserving the Open Internet Broadband Industry Practices,"[66] the CPUC filed comments that recommended that the FCC codify the four Open Internet principles set forth in the *Internet Policy Statement*.[67] The CPUC also submitted comments stating that the nondiscrimination rule should be similar to the Title II nondiscrimination principle, i.e., the rule should prohibit "unreasonable discrimination." The CPUC recommended the FCC assert jurisdiction under Title II, but in a "limited manner, so as to ensure continued growth and development of both technology and content."

---

[64] *Ibid.*

[65] *Ibid*.

[66] *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, GN Docket 09-191, WC Docket 07-52, rel. October 22, 2009 (*NPRM*).

[67] Also, in March of 2006, the CPUC voiced support for the FCC's *Internet Policy Statement* in Comments filed in an FCC proceeding regarding "Consumer Protection in the Broadband Era."

In July 2010, the CPUC submitted comments in another FCC proceeding,[68] supporting the CPUC's "previously expressed position that the FCC may use its Title II authority to regulate broadband Internet access service, and if the FCC uses its Title II authority it should forbear from rate regulation and other aspects of that historical regulatory regime." The CPUC continued to advocate for Title II prohibition on "unreasonable discrimination" under Section 202. The CPUC's comments expressed "California's support for the principles of a free and open Internet" and the Commission's interest in "maintaining that openness while encouraging the massive private investment necessary to expand the availability and adoption of broadband service across our nation."

In 2013, in an FCC proceeding on numbering services,[69] the CPUC answered Voice over Internet Protocol (VoIP) providers who stated publicly that they were "interstate, information service" providers, and thus exempt from regulation. The CPUC comments disagreed with the FCC's narrow classification of voice over the Internet that deemed VoIP providers to be "telecommunications carriers," and VoIP service to be "telecommunications service," but solely "for purposes of this part." Instead, the CPUC recommended full reclassification of VoIP to Title II, so that VoIP providers "share the burdens as well as the benefits of regulation."

Thus, ORA's recommendations are consistent with the CPUC's past recommendations for reclassification to Title II and prohibiting undue discrimination.

E. ORA's Recommendation Does Not Affect Application Of California's Public Utilities Code Section 710

ORA notes that California Public Utilities Code Section 710 prohibits California from regulating VoIP or IP-enabled services "except as required or delegated by federal law." However, ORA's recommendation does not conflict with Section 710. ORA supports reclassification for the purpose of implementing the FCC's Open Internet rules, not to impose regulation on VoIP.

Indeed, ORA's recommendation is intended to promote rapid broadband deployment and competition, and to reduce barriers to infrastructure investment. This policy is in harmony with the California Legislature's intent in California Senate Bill 1161 (as codified by Section 710), which stated: (1) Preserve the future of the Internet by encouraging continued investment and technological advances and supporting continued consumer choice and access to innovative services that benefit California; (2) Ensure a

[68] *In the Matter of the Framework for Broadband Internet Service,* GN Docket 10-127, rel. June 17, 2010.

[69] *In the Matter of Numbering Policies for Modern Communications*, et al, *NPRM, Order, and NOI*; WC Docket No. 13-97; et al (FCC 13-51) rel. April 18, 2013.

vibrant and competitive open Internet that allows California's technology businesses to continue to flourish and contribute to economic development throughout the state. ORA sees no conflict between the goals of the FCC's *NPRM* and Section 710.

F. Net Neutrality Cannot Be Implemented Using The "Commercially Reasonable" Standard

In the *NPRM*, the FCC does not propose to reclassify broadband, and instead proposes to try for the third time to impose rules pursuant to its authority in Section 706 of the 1996 Telecommunications Act. To address the concerns stated by the D.C. Circuit Court, the FCC proposes a rule requiring broadband providers to use "commercially reasonable" practices in the provision of broadband Internet access service.[70] The proposed rule provides:

> No Commercially Unreasonable Practices: A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice.

The FCC's rationale is that this rule was upheld pursuant to Section 706 without reclassification, and the D.C. Circuit explained that such an approach distinguished the data roaming rules at issue in *Cellco* from common carrier obligations.[71] The FCC stated that it "wishes to avoid subjecting broadband networks to common carriage *per se*" and it "renders unnecessary the adjudication of any question other than whether the adopted legal standard has been violated."[72] ORA agrees with the FCC that, if the "commercially reasonable" rule is adopted, the D.C. Circuit has already found that it is not a common carrier regulation and therefore does not require reclassification.

In fact, the "commercially reasonable" rule is something much less than Net Neutrality. First, it is *ex post facto*. Carriers must attempt to reach a reasonable commercial arrangement and then only after the attempt fails may one side proceed with a lawsuit to prohibit the commercially unreasonable behavior. The FCC could not proscribe in advance unreasonable terms sought by the ISPs. Second, the smaller edge providers, or startups, would simply not have the resources to engage in expensive and protracted litigation. They would be subject to whatever terms the ISPs wished to impose. Third, whatever terms agreed upon by the parties would likely be upheld as "commercially

---

[70] *NPRM* at ¶ 116.

[71] *Ibid*. See also *Cellco Partnership v. Federal Communciations Commission, et al*., 700 F.3d 534 (2012) (*Cellco*).

[72] *NPRM* at ¶ 118.

reasonable" since, after all, both sides, theoretically, agreed to them. Only if an edge provider refused to agree to the terms could the terms be challenged, resulting in a denial of service, which would directly affect end-user customers who would be caught in the cross-fire between the two parties to the dispute.

As the D.C. Circuit stated, a carrier will not be a common carrier "where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal."[73] Thus, without reclassification, the FCC must allow for some discrimination in the terms of service that the ISP is offering to its edge provider customers.

The D.C. Circuit has held that the "commercially reasonable" standard is much lower than the "just and reasonable" standard embodied in Title II, necessarily so in order to take any "commercially reasonable" rules out of the realm of common carriage regulation in *Cellco*. *Cellco* itself involved the "data roaming rule," which requires mobile-data providers to offer roaming agreements to other such providers on "commercially reasonable" terms.[74] Relevant features of the rule include the requirement that providers "offer data roaming arrangements on commercially reasonable terms and conditions," but the rule permits them to "negotiate the terms of their roaming arrangements on an individualized basis."[75] This means mobile providers may tailor agreements to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms, a hallmark of common carriage.

The FCC's *Data Roaming Order* stressed the distance between the "just and reasonable" standard in Title II and the "commercially reasonable" standard used in the rule, noting that "the actual provisioning of data roaming under those arrangements and any practices in connection with such arrangements will be subject to individually negotiated contractual provisions, unlike a common carrier obligation under Sections 201 and 202 of the Act which covers all charges and practices in connection with such services."[76] Moreover, the FCC noted the rule does not impose any form of common carriage rate regulation or obligation on providers of mobile data services to publicly disclose the rates, terms, and conditions of their roaming agreements.[77]

---

[73] *Verizon v. FCC* at 651, citing *Nat'l Ass'n of Regulatory Util. Commissioners v. FCC*, 533 F.2d 601, 608 (1976).

[74] *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers*, 26 FCCR 5411 (2011) (*Data Roaming Order*); *see also*, *Cellco*, 700 F.3d at 537.

[75] *Data Roaming Order*, at 5432 ¶ 43.

[76] *Id*., at 5444-46 ¶ 68.

[77] *Id*.

If the FCC intends to allow discriminatory terms and conditions and paid prioritization, this might satisfy the "commercially reasonable" rule given the classification of Internet access service as information service. However, given the lack of a developed rule in the *NPRM* many unanswered questions remain, as demonstrated by the FCC's myriad questions about how such a standard might work. Although the FCC is seeking to establish an "enforceable legal standard of conduct" and "clearly established factors" that give additional guidance on the kind of conduct that is likely to violate this enforceable legal standard,[78] the discussion in the *NPRM* lacks both clarity and specificity regarding what the FCC is proposing to codify as an enforceable rule that is not common carriage *per se*.

Recent developments in the wake of *Cellco* pertaining to implementation of the FCC's Data Roaming rule indicate that the "commercially reasonable" standard may not be workable, particularly in a market with limited providers.[79] For example, on May 27, 2014, T-Mobile filed a petition at the FCC seeking a declaratory ruling that provides "prospective guidance and predictable enforcement criteria for determining whether the terms of any given data roaming agreement or proposal meet the 'commercially reasonable' standard adopted by the FCC in the Data Roaming Order."[80] T-Mobile claims that, despite the FCC's adoption of the data roaming rule, mobile providers are still having major problems getting data roaming agreements (primarily with the two largest providers, AT&T and Verizon) on "commercially reasonable" terms. According to T-Mobile, the problems are due in large part to ambiguities in the "commercially reasonable" standard itself, unequal bargaining power between the parties, and lack of competition for potential roaming providers. In particular, T-Mobile asks for more predictable criteria in the "commercially reasonable" standard to provide greater certainty to those business customers seeking data roaming arrangements.[81]

---

[78] *Id.*, at ¶ 111.

[79] In the *2010 Open Internet Order*, although the FCC did not engage in a market power analysis, it found that ISPs had multiple incentives to limit Internet openness. Moreover the FCC found that most residential customers have only one or two options for wireline broadband Internet access service, increasing the risk of market power, and incur significant costs in switching from one provider to another if they want to escape unscrupulous practices. (*2010 Open Internet Order*, at ¶¶ 14, 31-51.) The D.C. Circuit found the FCC's assessment of ISPs' incentives and economic ability to threaten Internet openness to be supported by the record and grounded in "common sense and economic reality," and agreed that the FCC need not engage in a market power analysis to justify its rules. (*Verizon*, slip op. at 38, 740 F.3d at 644.) Nonetheless, in the *NPRM* the FCC is seeking comment on whether it should conduct a market power analysis with respect to broadband providers and how it should go about that analysis. (*NPRM*, at ¶ 49.)

[80] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc. (filed May 27, 2014) (T-Mobile Petition).

[81] T-Mobile Petition, at 11.

G. Conclusion

In summary, if the FCC does not reclassify broadband as a telecommunication service, it is not possible for the FCC to impose the anti-blocking and anti-discrimination rules advanced by the FCC in 2010. By definition, the attempt to impose rules under the proposed "commercially reasonable" rule will amount to something far less than Net Neutrality if those rules are to survive a legal challenge.